

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ENTERED ON DOCKET

1/3/07

IN RE:

PAMELA TASHAY PATTERSON,

Debtor.

CASE NO. 05-70658-CRM

CHAPTER 7

JUDGE MULLINS

CAROLYN DOCKERY,
Plaintiff,

v.

PAMELA TASHAY PATTERSON,

Defendant.

ADVERSARY PROCEEDING NO.
05-06381

ORDER

THIS MATTER is before the Court on the Plaintiff's Motion for Default Judgment ("Motion"), filed on February 3, 2006. The Plaintiff, Carolyn Dockery, commenced the above-styled action against the Defendant, Pamela Tashay Patterson, on September 9, 2005. The Plaintiff filed the Complaint to Determine Dischargeability (the "Complaint") seeking a determination of nondischargeability of debt owed to the Plaintiff by the Defendant pursuant to 11 U.S.C. § 523(a)(6) of the Bankruptcy Code. Plaintiff's Complaint further objects to discharge pursuant to 11 U.S.C. § 727(a)(4) because Plaintiff alleges that Defendant either gave false information or failed to give information pertaining to Defendant's Statement of Financial Affairs and schedules. The Plaintiff requests an entry of judgment against the Defendant in the amount of \$100,000 and attorney's fees under state law because Defendant allegedly trespassed into Plaintiff's home and committed intentional torts against the Defendant.

On September 12, 2005, the Summons in an Adversary Proceeding (the "Summons") was

issued commanding the Defendant to file and serve an answer or response to the Complaint by October 12, 2005. Pursuant to Rule 7004(b) of the Federal Rules of Bankruptcy Procedure, the Plaintiff served a copy of the Complaint and the Summons on the Defendant and Defendant's counsel by regular first class United States mail, postage pre-paid, on September 26, 2005. Rule 7012 of the Federal Rules of Bankruptcy Procedure requires a defendant to "serve an answer within 30 days after the issuance of the summons." Fed. R. Bankr. P. 7012. On December 19, 2005, an Alias Summons was issued commanding Defendant to file and serve an answer or response to the Complaint by January 18, 2006. On February 3, 2006, Plaintiff filed a Motion for Default Judgment. On February 8, 2006, Defendant filed an untimely answer (the "Answer"). On December 5, 2006, the Clerk's Office entered an Entry of Default pursuant to Bankruptcy Rule 7055.

Some courts have observed the filing of a late answer is analogous to the filing of a motion to vacate a default. *McMillen v. J.C. Penney Co., Inc.*, 205 F.R.D. 557, 558 (D. Nev. 2002); *Heber v. U.S.*, 145 F.R.D. 576, 577 (D. Utah 1992). When a party files a late answer, that party receives "the same opportunity to present mitigating circumstances that [it] would have had if a default had been entered and [it] had moved under Rule 55(a) to set it aside." *Heber*, 145 F.R.D. at 577 (quoting *John v. Sotheby's, Inc.*, 141 F.R.D. 29, 35 (S.D.N.Y. 1992)). Thus, the Court will treat Debtor's untimely Answer to the Complaint as a motion to set aside a default.

Rule 55(c) of the Federal Rules of Civil Procedure, made applicable by Rule 7055 of the Federal Rules of Bankruptcy Procedure, provides, "For good cause shown the court may set aside an entry of default" The Eleventh Circuit has held that the "good cause" standard is a "mutable standard, varying from situation to situation" and a "liberal one." *Compania Interamericana Export-Import, S.A. v. Compania Dominicana de Aviacion*, 88 F.3d 948, 951 (11th Cir. 1996). In determining whether good cause exists to set aside an entry of default, courts have considered "whether the default was culpable or willful, whether setting it aside would prejudice

the adversary, and whether the defaulting party presents a meritorious defense." *Id.* (citations omitted). Courts have examined other factors including "whether the defaulting party acted promptly to correct the default." *Id.* (citing *Dierschke v. O'Cheskey*, 975 F.2d 181, 184 (5th Cir. 1992)).


Under the circumstances of this case, the Court finds that grounds exists for vacating the Entry of Default and denying Plaintiff's Motion for Default Judgment. The Entry of Default was entered over ten months after Defendant had already filed an Answer. Aside from Plaintiff's self-affidavit entered on February 10, 2006, no action was taken by either party during this time. Moreover, the record reveals no additional filings by either party since the time that the Entry of Default was entered on December 5, 2006. Thus, it appears that setting aside the Entry of Default would have no prejudicial effect on this adversary proceeding. Second, Defendant's untimely filed Answer was filed only five days after Plaintiff's filed its Motion for Default Judgment. As the untimely filed Answer is construed by this Court as a motion to set aside the default judgment, Defendant has therefore showed a sufficient and expeditious interest in correcting the default. Accordingly,

IT IS ORDERED that the Motion for Default Judgment be and is hereby **DENIED**.

IT IS FURTHER ORDERED that the Clerk's Entry of Default be and is hereby **VACATED**.

The Clerk's Office is directed to serve a copy of this Order upon Plaintiffs' Counsel, the Defendant, Defendant's Counsel, and all other interested parties.

IT IS SO ORDERED, this 21 day of December, 2006.



C. RAY MULLINS
UNITED STATES BANKRUPTCY JUDGE